

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VAN HUNG VI,

No. C 07-5527 CW

Petitioner,

v.

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

NANCY ALCANTAR, Field Office
Director, United States Immigration
and Customs Services (USICE); JANET
L. MYERS, Assistant Secretary;
MICHAEL CHERTOFF, Secretary,
Department of Homeland Security,

Respondents.

Petitioner Van Hung Vi brings this action seeking a writ of habeas corpus under 28 U.S.C. § 2241, claiming that his potential future detention by U.S. Immigration and Customs Enforcement (ICE) is not authorized by the Immigration and Nationality Act (INA) and is unconstitutional. Respondents Nancy Alcantar, Janet L. Myers and Michael Chertoff oppose the petition. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court denies the petition.

BACKGROUND

Petitioner is a Vietnamese national. In 1994, a final order

1 of removal was issued against him. However, Petitioner could not
2 be deported because a valid travel document could not be obtained.
3 In 1995, Petitioner was released from ICE custody on a \$5,000
4 "delivery bond." Pursuant to this bond, Petitioner is required to
5 present himself any time ICE demands that he do so. Failure to
6 appear could result in Petitioner being taken back into ICE
7 custody. ICE sent Petitioner three demand letters, on March 24,
8 2006, January 13, 2007 and April 20, 2007. Petitioner failed to
9 appear as ordered in these letters.

10 In February, 2007, Petitioner was indicted on federal drug
11 charges in the Eastern District of California. He is currently
12 detained in the Sacramento County Jail as he awaits trial.
13 Petitioner twice requested that he be released on bail, but each
14 request was denied by a federal magistrate judge.

15 In June, 2007, ICE discovered that Petitioner was being
16 detained on criminal charges. It placed an immigration detainer on
17 Petitioner, signifying its intention to take him into ICE custody
18 should he be released from the Sacramento County Jail.

19 Petitioner now seeks a writ of habeas corpus compelling
20 Respondents to withdraw the detainer. He argues that, because he
21 cannot be deported, his future detention will be indefinite and
22 thus is not authorized by statute. On April 4, 2007, the Court
23 denied Respondents' motion to dismiss the petition, finding that
24 Petitioner was "in custody," as that term is used in the habeas
25 statute. Respondents now oppose the petition on the basis that
26 Petitioner's claim is not yet ripe for decision.

DISCUSSION

Detention of individuals who have been ordered deported is governed by 8 U.S.C. § 1231(a). This statute establishes a "removal period" that lasts for ninety days, during which time "the Attorney General shall remove the alien." § 1231(a)(1)(A). It also provides, "During the removal period, the Attorney General shall detain the alien." § 1231(a)(2). The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

§ 1231(a)(1)(B).

In Zadvydas v. Davis, 533 U.S. 678 (2001), the Supreme Court addressed, as a matter of statutory interpretation, the meaning of 8 U.S.C. § 1231(a)(6), which provides that certain aliens "may be detained beyond the removal period" of ninety days established in § 1231(a)(1)(A). The issue was whether the statute permits the indefinite detention of aliens who are subject to a final order of removal but cannot be removed because no country will accept them.

The Court reasoned that, because "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem," the statute should not be interpreted so as to authorize indefinite detention in the absence of a clear statement by Congress. Id. at 690, 696-97. Thus, the Court

1 construed § 1321(a)(6) to authorize only detention that was
2 "reasonably necessary to bring about [an] alien's removal from the
3 United States." Id. at 689. The Court stated that six months
4 should be considered a "presumptively reasonable period of
5 detention" under this standard.

6 After this 6-month period, once the alien provides good
7 reason to believe that there is no significant likelihood
8 of removal in the reasonably foreseeable future, the
9 Government must respond with evidence sufficient to rebut
10 that showing. And for detention to remain reasonable, as
11 the period of prior postremoval confinement grows, what
12 counts as the "reasonably foreseeable future" conversely
would have to shrink. This 6-month presumption, of
course, does not mean that every alien not removed must
be released after six months. To the contrary, an alien
may be held in confinement until it has been determined
that there is no significant likelihood of removal in the
reasonably foreseeable future.

13 Id. at 701.

14 Although Petitioner may someday find himself in a situation to
15 which Zadvydas's holding applies, adjudicating his claim at the
16 present time would require an unacceptable degree of
17 prognostication. Petitioner is currently being detained without
18 bond in the Sacramento County Jail pending his trial on federal
19 drug charges. He is not in the custody of ICE and will not be
20 transferred to ICE's custody until he is released, which
21 conceivably, if he is convicted, may not occur for years. The hold
22 does not prevent him from seeking pretrial release on the criminal
23 charges. If he were released to the detainer, he might be released
24 on bond from ICE custody, or his habeas petition might become ripe.
25 It is not possible to determine from the facts as they exist now
26 whether Petitioner might be subject to potentially indefinite
27 detention at some time in the future. An unforeseen event may take

1 place -- a travel document for Petitioner may become available, for
2 instance, or a change in circumstances may otherwise enable ICE to
3 execute Petitioner's removal order. Even if ICE continues to be
4 unable to deport Petitioner, it is far from certain that his future
5 detention would necessarily be unlawful. Zadvydas does not support
6 the conclusion that any future detention by ICE, no matter how
7 brief or on what basis, would be unlawful; it is concerned only
8 with indefinite detention. Petitioner has not shown -- and cannot,
9 given the present circumstances -- that his future detention is
10 likely to be indefinite. See Pelich v. INS, 329 F.3d 1057, 1059
11 (9th Cir. 2003) (burden is on the alien "to show, after a detention
12 period of six months, that there is 'good reason to believe that
13 there is no significant likelihood of removal in the reasonably
14 foreseeable future'") (quoting Zadvydas, 533 U.S. at 710).

15 Because the Court cannot adjudicate the legality of
16 Petitioner's hypothetical future detention based on the current
17 record, this case, at a minimum, is not ripe for decision as a
18 prudential matter.¹ See Simmonds v. INS, 326 F.3d 351, 357 (2d
19 Cir. 2003) ("Prudential ripeness is . . . a tool that courts may
20 use to enhance the accuracy of their decisions and to avoid
21 becoming embroiled in adjudications that may later turn out to be
22 unnecessary or may require premature examination of, especially,
23 constitutional issues that time may make easier or less
24 controversial.")

25
26 ¹The Court expresses no opinion as to whether the case
27 presently presents a justiciable controversy under Article III of
28 the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. If, at some future time, it appears that Petitioner is being detained unlawfully, he may file another habeas petition at that time. The clerk shall enter judgment and close the file. Each party shall bear its own costs.

IT IS SO ORDERED.

Dated: 7/3/08



CLAUDIA WILKEN
United States District Judge